

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

PIONEER HI-BRED
INTERNATIONAL, INC.,

Plaintiff,

vs.

OTTAWA PLANT FOOD, INC.,

Defendant.

No. C98-4016-MWB

**ORDER ON MOTION
TO COMPEL**

On July 25, 2003, the plaintiff Pioneer Hi-Bred International, Inc. (“Pioneer”) filed a “Motion to Compel Documents Disclosed To and Testimony of Ottawa Plant Food’s Expert Witnesses,” and a request for expedited relief.¹ (Doc. No. 181) The motion was supported by a brief. (Doc. No. 182) The defendant, Ottawa Plant Food, Inc. (“Ottawa”) resisted the motion on July 28, 2003. Later on July 28, 2003, the court received a letter from Pioneer’s counsel replying to Ottawa’s resistance.

The dispute concerns communications between Ottawa’s attorneys and expert witnesses retained by Ottawa to testify at trial. Pioneer asks the court to order production of all materials sent to these experts by Ottawa’s attorneys, and further asks the court to order the witnesses to respond to questions during their depositions about communications with counsel for Ottawa, which would have the effect of overruling objections by Ottawa’s attorneys that the questions invade the attorney-client privilege and violate the work product doctrine.

¹The request for expedited relief is **granted**.

On July 21, 2003, Pioneer's counsel deposed Mark Patterson, an expert designated by Ottawa. The afternoon before the deposition, counsel for Ottawa faxed a letter to Pioneer's counsel enclosing a privilege log listing a number of documents as to which privilege was being claimed, most of which were communications between Ottawa's counsel and Ottawa's expert witnesses. During the deposition, counsel for Ottawa objected to numerous questions asked of Patterson, based on assertions of the attorney-client privilege and work product. Further expert depositions are scheduled for today and for July 30, 2003.

The court held a telephonic hearing on the motion on July 28, 2003, at 8:30 a.m. Edmund J. Sease and Christine Lebrón-Dykeman appeared at the hearing on behalf of Pioneer, and Keith D. Parr and Mark R. Sargis appeared at the hearing on behalf of Ottawa. The court now considers the matter to be fully submitted.

In 1993, significant amendments were made to the Federal Rules of Civil Procedure. In particular, substantial changes were made to Rule 26, including a requirement in Rule 26(a)(2) that parties disclose to other parties the identity of any person who may be used at trial to present expert testimony, and provide a written report prepared and signed by the witness. The report is required to contain, *inter alia*, "the data or other information considered by the witness in forming the opinions." The accompanying Advisory Committee Note explains, "The report is to disclose the date and other information considered by the expert. . . . Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed."

The scope of the requirements of this rule was addressed by the United States Court of Appeals for the Federal Circuit in *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d

1370, 1375-76 (Fed. Cir. 2001) (“*In re Pioneer*”). Purportedly applying Eighth Circuit law, the Federal Circuit held as follows:

The revised rule proceeds on the assumption that fundamental fairness requires disclosure of all information supplied to a testifying expert in connection with his testimony. Indeed, we are quite unable to perceive what interests would be served by permitting counsel to provide core work product to a testifying expert and then to deny discovery of such material to the opposing party.

In re Pioneer, 238 F.3d at 1375.

There are no reported circuit court opinions dealing with this issue other than *In re Pioneer*. The Federal Circuit cited an opinion of the Eighth Circuit Court of Appeals dealing with privilege questions (*United States v. Cote*, 456 F.2d 142 (8th Cir. 1972) as general support for its interpretation of Rule 26(a)(2), but cited no other Eighth Circuit law.² The only opinion by the Eighth Circuit Court of Appeals that even mentions the issue is *Pepsico, Inc. vs. Baird, Kurtz & Dobson LLP*, 305 F.3d 813 (8th Cir. 2002). The *Pepsico* court expressly did not address the issue before the court here, but in a footnote, the court described the holding of *In re Pioneer* as “applying Eighth Circuit law on privileges and holding that documents and information disclosed to an expert in connection with testimony are discoverable whether or not the expert relies on the documents and information in preparing the expert report.” *Id.*, 305 F.3d at 817 n.2.

²As authority for the contrary view of Eighth Circuit law, Ottawa points the court to two opinions by a United States Magistrate Judge filed in the Northern and Southern Districts of Iowa. See *Estate of Phillip P. Chopper v. R.J. Reynolds Tobacco Co.*, 195 F.R.D. 648 (N.D. Iowa 2000); *Estate of Moore v. R.J. Reynolds Tobacco Co.*, 194 F.R.D. 659 (N.D. Iowa 2000). However, the magistrate judge analyzed the issue under Rule 26(b)(3), rather than the amended language of Rule 26(a)(2). Before January 1, 2001, both federal districts in Iowa had “opted out” of Rule 26(a)(2) by local rule, as was permitted. Beginning with the redraft of the Local Rules effective January 1, 2001, and continuing with the current redraft of the Local Rules, Rule 26(a)(2) now is fully implemented in both districts.

However, even though it has not addressed the particular issue at hand, the Eighth Circuit Court of Appeals has noted that despite the fact one circuit court of appeals is not bound by decisions from other circuits, “ ‘[W]e adhere to the policy that a sister circuit’s reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket.’ ” *United States v. Auginash*, 266 F.3d 781, 784 (8th Cir. 2001) (quoting *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979)).” *McGavern v. Miller (In re: Miller)*, 276 F.3d 424, 428-29 (8th Cir. 2002). See *Spicknall v. Comm’r of Internal Revenue (Estate of Spicknall)*, 285 F.3d 561, 567 (8th Cir. 1961) (“This Court is not justified in refusing to follow the decision of another Court of Appeals unless satisfied that it is erroneous.” (Citations omitted.)) As such, this court finds the Federal Circuit’s opinion in *In re Pioneer* to be not only persuasive, but representative of the likely result should the Eighth Circuit have the opportunity to consider the issue on its merits.

In the present case, Ottawa has provided the court with copies of the documents listed on the privilege log, in both unredacted form and showing the redactions that were made in certain of the documents that Ottawa has produced to Pioneer. The court has reviewed all of the documents. Clearly, some of the documents represent work product, but the court finds Ottawa has made a valid waiver of the work product privilege with respect to all of the documents, and they should be produced.

Accordingly, Pioneer’s motion is **granted**. Ottawa must produce copies of all of the documents, without redactions, and Pioneer’s counsel may question expert witnesses regarding their communications with Ottawa’s counsel.

IT IS SO ORDERED.

DATED this 25th day of July, 2003.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT